



When A Gift Is Truly A Gift: The High Court Rejects Afterthought Trusts In Share Transfers

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The recent High Court decision in *Loi Yap Loong v Harald Richard Hemming & Ors* [2026] MLJU 1368 serves as an important reminder that commercial transactions must be characterised according to what the parties actually agreed at the time and not according to explanations developed after litigation begins.

Rejecting an attempt to retrospectively recast an outright share transfer as a trust, the High Court reaffirmed that ownership recorded in a company's register carries significant legal consequences and that allegations of trusts or security arrangements must be supported by clear contemporaneous evidence.

Beyond the immediate dispute, the judgment reinforces several well-established principles of company and trust law. Registration of shares remains strong evidence of both legal and beneficial ownership, and courts will be slow to permit parties to rewrite the legal character of a completed transaction through litigation-driven assertions unsupported by objective evidence.

The Law On Share Transfers, Gifts And Trusts

It is well established that the registration of shares in a person's name constitutes *prima facie* evidence of both legal and beneficial ownership. A party seeking to rebut that presumption bears the burden of establishing, through cogent evidence, that the shares were intended to be held as security, collateral, on trust or in some other limited capacity.

Where an express trust is alleged, the law requires proof of the well-established three certainties, namely certainty of intention, certainty of subject matter and certainty of objects. Equity will not infer a trust merely because one party subsequently asserts that beneficial ownership was intended to remain elsewhere. Rather, the existence of a trust must be established by objective evidence demonstrating the parties' intention at the time of the transaction.

Likewise, where shares are said to have been transferred as security or collateral, commercial reality ordinarily requires contemporaneous documentation identifying the underlying obligation, the secured debt, the parties' respective rights and the circumstances in which the shares are to be returned or realised.

By contrast, a gift requires no consideration. Indeed, the absence of consideration is the defining characteristic of a gift rather than a legal deficiency, as recognised by the Court of Appeal in *Sabah Berjaya Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri* [1999] 3 MLJ 145.

Although parties are entitled to plead in the alternative, they cannot rely upon mutually inconsistent factual positions that are incapable of standing together without undermining the credibility of their own case.

Background

The Plaintiff (Loi Yap Loong), was transferred 10,000 shares in the 4th Defendant company by the 1st Defendant in 2018, representing 5% of the company's issued share capital. Following a subsequent capital increase in 2020, the Plaintiff received a further allotment of 27,500 shares, increasing his total shareholding to 37,500 shares.

In 2023, the company undertook another share capital increase under which all newly issued shares were allotted to the 2nd Defendant, diluting the Plaintiff's interest from 5% to 3.75%.

Upon conducting a company search in 2024, the Plaintiff discovered not only the dilution of his shareholding but also changes to the company's directorship and ownership structure. His solicitors subsequently issued a letter requiring the company to explain the changes.

It was only in response to that letter that the 1st and 2nd Defendants, together with the company, asserted for the first time that the shares registered in the Plaintiff's name were not beneficially owned by him but were instead held on trust.

The Plaintiff maintained that the shares had been transferred absolutely and unconditionally as a gesture of appreciation for legal services rendered and financial assistance previously provided. The Defendants, however, initially characterised the shares as security or collateral before subsequently asserting that they were held on trust. By way of counterclaim, they sought a declaration that the Plaintiff held all 37,500 shares on trust for the 2nd Defendant.

The Parties' Positions

The Plaintiff argued that the Defendants' evolving explanations demonstrated that the alleged trust was nothing more than an afterthought. There was no contemporaneous agreement, correspondence or corporate documentation suggesting that the shares were ever intended to be held as security, collateral, on a nominee basis or on trust. Instead, the shares were duly transferred and registered in his name without qualification or restriction.

The Plaintiff further submitted that the commercial circumstances reinforced this conclusion. At the material time, the company was in financial difficulty and the shares had little commercial value, making it inherently improbable that they were intended to serve as meaningful security for any indebtedness. Moreover, the Defendants' subsequent request for the return of the shares to facilitate financing was inconsistent with the existence of a genuine security arrangement. If the shares had truly been provided as security, there would have been no need to request their return before the alleged indebtedness had been discharged.

The Defendants, on the other hand, maintained that the shares had never been intended as a gift. They contended that the Plaintiff merely held the shares as security or collateral pending repayment of monies advanced and legal fees incurred, and later asserted that the Plaintiff held them on trust. They further claimed that all outstanding sums had since been repaid, thereby entitling them to the return of the shares.

The High Court's Decision

The High Court rejected the Defendants' case and held that the shares had been transferred to the Plaintiff as an outright and unconditional gift. In reaching that conclusion, the court identified several significant deficiencies in the Defendants' case as follows:

- (a) The Defendants' characterisation of the transaction shifted materially over time. What began as an allegation that the shares were held as "security" or "collateral" later evolved into an assertion that they were held on trust. These were not merely alternative legal arguments but were founded upon inconsistent and legally irreconcilable factual premises.
- (b) There was a complete absence of contemporaneous evidence supporting the alleged security or collateral arrangement. The court observed that commercial security arrangements ordinarily involve written agreements identifying the underlying obligation, enforcement mechanisms and redemption rights. No such documentation existed. There were no written agreements, no contemporaneous communications and no corporate records evidencing any intention to create security over the shares.
- (c) The surrounding commercial circumstances rendered the Defendants' explanation inherently implausible. At the time of the transfer, the company was in a weak financial position and the shares possessed minimal commercial

value. In those circumstances, it was unrealistic that the shares would have been intended to function as meaningful security or collateral.

- (d) The court accepted the Plaintiff's consistent evidence that the transfer was intended as a gesture of appreciation for legal services rendered and financial assistance provided. The shares were transferred unconditionally, duly registered in the Plaintiff's name and were never expressed to be subject to any restriction or obligation requiring their return. Accordingly, both legal and beneficial ownership passed to the Plaintiff.
- (e) The court held that the alleged trust was an afterthought raised only after the dispute had arisen. Apart from the absence of contemporaneous evidence, the Defendants failed to establish the fundamental requirements for the creation of an express trust. In particular, the alleged beneficiary shifted over time, undermining certainty of objects. The court therefore concluded that the alleged trust amounted to nothing more than a retrospective reconstruction of the parties' intentions and could not be sustained.

Commentary

The decision reinforces several important principles that extend well beyond the facts of this dispute.

First, registration of shares continues to carry substantial evidential weight. Although the presumption arising from registration is rebuttable, the burden lies squarely on the party seeking to establish that the registered shareholder does not enjoy beneficial ownership. Bare assertions, unsupported by contemporaneous evidence, will rarely suffice.

Secondly, commercial arrangements must be documented consistently with their intended legal effect. Where shares are intended to operate as security, collateral or nominee holdings, the relevant agreements should clearly identify the parties' rights and obligations. Courts are understandably reluctant to infer such arrangements retrospectively where no supporting documentation exists.

Thirdly, the judgment serves as a reminder that while alternative pleading is permissible, parties cannot rely upon shifting factual narratives that are fundamentally inconsistent. A case that evolves from security, to collateral, and ultimately to trust risks undermining its own credibility.

Finally, the decision illustrates the court's continued insistence that allegations of trust must satisfy the strict requirements of certainty recognised in equity. Trusts cannot be created retrospectively through litigation nor inferred merely because doing so would produce a more favourable outcome for one party.

Conclusion

The High Court's decision reaffirms a fundamental principle of commercial law: transactions must be characterised according to the parties' objectively ascertainable intentions at the time they are entered into, not by explanations developed after disputes arise.

Where shares are transferred absolutely and registered without qualification, the law will ordinarily presume that both legal and beneficial ownership have passed. Parties seeking to displace that presumption must do so through clear, cogent and contemporaneous evidence. Attempts to retrospectively recharacterise completed transactions as security arrangements or trusts, particularly where those assertions are inconsistent with the parties' conduct and unsupported by documentary evidence are unlikely to succeed.

The judgment therefore provides an important reminder for shareholders, directors and advisers alike: if shares are intended to be held on trust, as nominee holdings or by way of security, that intention should be properly documented at the outset. Otherwise, the courts are likely to uphold the legal consequences of what the parties actually did, rather than what one party later wishes they had agreed.

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